Saunders House a/k/a The Old Man's Home of Philadelphia *and* District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO. Case 4-CA-12047

December 16, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 30, 1982, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in opposition to the Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] conclusions of the Administrative Law Judge as modified herein and to adopt his recommended Order.

The Administrative Law Judge found that the Respondent violated Section 8(a)(5) and (1) of the Act when it granted wage increases to employees without affording the Union an opportunity to negotiate and bargain as the exclusive representative of the employees in such matters. The Administrative Law Judge rejected the Respondent's argument that the ongoing negotiations were at impasse making the wage increase permissible. He found rather that the Respondent had negotiated in bad faith and, thus, no impasse could be found.

The Respondent excepts to this finding, arguing that good faith at the bargaining table was not at issue in the case as it had been neither alleged in the complaint nor litigated at the hearing. We agree with the Respondent that its good faith was not in issue. Yet despite the merit in the Respondent's exceptions, we find that the Administrative Law Judge's ultimate conclusion is correct with regard to the Respondent's institution of the wage increase. Our disagreement with the Administrative Law Judge is with his analysis of the issues before him, not his conclusion.

The Respondent and the Union were engaged in negotiations for an initial contract following the August 28, 1980, certification of the Union as the exclusive bargaining representative for the following unit of employees:

> All full and regular part time service, maintenance and technical employees including dietary, housekeeping, maintenance and nursing including nursing aides, licensed practical nurses and licensed graduate practical nurses employed by the Company at its Lancaster Avenue and City Line Avenue, Philadelphia, Pa. facility; excluding all other employees including professionals, managers, chefs, registered nurses, office clerical, guards and supervisors as defined in the Act.

As fully set forth in the Administrative Law Judge's Decision, the parties met a total of 17 times over a 7-month period beginning September 16, 1980. Prior to the initial bargaining session, the Union submitted its contract proposal which included both a $40-a-week across-the-board wage increase and a cost-of-living increase. It also specified full union security and dues checkoff. At the September 16 meeting, the union wage proposal was not discussed. The Union expressed disapproval of the implementation of an 8-percent wage increase which the Employer had much earlier announced in a series of letters to the Union's attorney. At this early stage, the Respondent declared the discussion of wages to be at impasse and subsequently the Respondent implemented the 8-percent increase.[2] The Respondent stated that it would present its own proposal to the Union shortly, which it did on September 19.

The Respondent's proposed contract did not include a wage proposal, but it indicated that the wage proposal was to follow. Throughout the next five sessions, the proposal was not presented and wages were not discussed. Some language concessions occurred during this period. On November 24, 1980, the Union asked for the Respondent's position on wages, union security, and dues checkoff. The Respondent's spokesman said the Company's answer on checkoff and union security was "no" but that a wage proposal would be presented at the next session.

On December 2, 1980, the Union made a new wage proposal which included an annual across-the-board increase for 3 years and a cost-of-living increase in the second year. The Respondent countered with an offer of a 1-year contract with a

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The Union filed unfair labor practice charges with regard to the 8-percent increase; the matter was ultimately resolved through an informal settlement agreement.

cost-of-living increase but refused to discuss wages any further; nor did discussion of wages take place at the next three sessions.

On February 6, 1981, the parties discussed their current position. Each side agreed to review its position and an "off the record" meeting was set. On February 20, the chief negotiator for each side met to candidly discuss their positions. The union representative described as ultimately acceptable to the Union three successive annual increases of 8 percent, modified union security, and dues checkoff. The Respondent's negotiator agreed to discuss the union position with the Company and to present a wage proposal at the next session, which it did.

On March 2, 1981, the Respondent proposed a complete revision of wages in all job classifications, resulting in increases from 0 to 55 cents. The average salary increase was 6-1/2 percent; in addition, a 6-percent general increase was to be given in lieu of the Respondent's December 2 offer of a cost-of-living increase. This offer was regarded by the Respondent as its final offer. Throughout the remaining sessions the Respondent returned to this offer as the only proposal it would consider.

On March 10, the Union proposed a sequence of annual raises of 8 percent, 10 percent, and 10 percent with no cost-of-living increase mentioned. There was no response from the Respondent to this proposal. At the hearing, Respondent's chief negotiator said he did not respond because he knew following the February 20 meeting that this was not the Union's final offer; however, there had been no response to the February 20 union statement either.

On March 16, the Federal Mediation and Conciliation Service appointed a board of inquiry. The Union presented its wage position to the board as being the sequence of increases included in the March 5 offer but now with a cost-of-living increase. The Union continued to seek full union security and dues checkoff among several other key issues. Respondent sought only its proposal of March 2, maintaining its unwillingness to accept anything else. The nonbinding recommendations of the board were unacceptable to either party; however, the Union subsequently adopted the recommendation of a modified union shop which had been included in the board of inquiry's report. That modification was presented by the Union at the March 30 bargaining session.

On April 15, the union negotiator presented a series of union proposals intending to end what he described as an "impasse."[3] The proposals included a general 8-percent wage increase during each of the 3 years of the contract with no cost-of-living increase, certain grievance procedures, modified union security, and checkoff, as proposed before. In addition, the Union added its proposal for sick leave, which had not been stressed before the board of inquiry, but dropped a request for the reinstatement of two workers. Little substantive discussion took place on these issues. The Respondent's negotiator agreed to discuss the matter with the Respondent; however, in his testimony he acknowledged that the proposals would be unacceptable as they had all been presented and rejected before. In fact, the next day, a letter was hand delivered to the Union indicating that the Respondent saw no change in the Union's proposal and that the parties were at impasse. The Respondent also said that it would implement the wage increases in its March 2 offer if that same offer was not accepted by the Union prior to April 22. As stated earlier, the Respondent implemented the proposed wage increase on April 22 despite the Union's protestations that the parties were not at impasse.

Based on the above, we find no impasse existed at the time the Respondent instituted the unilateral change in wages. Accordingly, its action violates Section 8(a)(5) and (1) of the Act. It is well settled that an employer violates Section 8(a)(5) by refusing to negotiate over a mandatory subject of bargaining or by unilaterally changing a condition of employment which is under negotiation irrespective of whether the action is taken in good faith.[4] In *N.L.R.B.* v. *Benne Katz, d/b/a Williamsburg Steel Products Company*, 369 U.S. 736, 743 (1962), the Supreme Court held:

> A refusal to negotiate *in fact* as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.

[3] The Respondent would treat this characterization as evidence that negotiations had reached impasse. We are unconvinced given the bargaining posture of the Union that the term was used with legal precision.

[4] As noted earlier, the Administrative Law Judge found good faith to be in issue, contending that the determination of impasse encompasses consideration of good faith. While that is true, the complaint and the parties in their opening comments ended any speculation as to the absence of good faith on the Respondent's part. It would impugn the fairness of the hearing to conclude that a matter specifically not litigated was at the heart of the Respondent's violation. There is then no question that the Respondent bargained in good faith.

A unilateral change is unlawful under this rationale if the subject matter of the change is "under negotiation"; i.e., if the parties have not reached impasse. Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.[5] These five factors when applied to this case will not support a finding of impasse. Although we have found Respondent's good faith is undisputed and this factor, therefore, standing alone, lends support to a finding that the parties reached impasse, the remaining factors (discussed *seriatim*) clearly establish that impasse was not reached. The parties were negotiating an initial agreement. Thus, the bargaining history does not favor a finding of impasse. To the contrary, it is the Board's policy to encourage "the fullest opportunity" for parties to effect agreement in initial contract negotiations. *Alsey Refractories Company*, 215 NLRB 785, 786 (1974). Further, the negotiations were long, including 17 sessions over 6 months. In these sessions, however, discussion was often limited especially on the crucial question of wages. In fact, Respondent delayed specific discussion of wages until the March 2 meeting at which it made its first and last statement on the issue. Thus, length of negotiations does not support a finding of impasse. As to the importance of the issues of disagreement, here there is no ambiguity. Very serious issues concerning wages remained open at the point when the Respondent implemented the wage increase.

The final factor here, the contemporaneous understanding of the parties, is conclusive. It is well settled that for impasse to be found the parties must have reached "that point of time in negotiations when the parties are warranted in assuming that further bargaining would be futile." *Patrick & Company*, 248 NLRB 390, 393 (1980). In this case, the movement on the part of the union throughout the bargaining and especially prior to the April 22 wage increase cannot justify the Respondent's conclusion that the parties were deadlocked.

Clearly, the Union did not believe negotiations were at impasse. Further, there is sufficient objective evidence to justify its belief. On April 15, the Union offered a proposal which showed movement on its part in important areas of dispute. The wage offer it made was the first "on the record" proposal of what the Union had intimated would be acceptable to it at the February 20 meeting between the parties' chief negotiators.[6] It was coupled with other proposals, many of which had been made before. The repetition of proposals made before is not sufficient to nullify the real concessions that the Union was offering.

In *Yama Woodcraft, Inc., d/b/a Cal-Pacific Furniture Mfg. Co.*, 228 NLRB 1337 (1977), the Board found that the willingness of a party to make concessions in some areas suggested a willingness to make further concessions in order to reach agreement. The other party is not justified in concluding that negotiations are at impasse simply because concessions have not been made in the area it finds most crucial or the concessions themselves have not been sufficiently generous. The Union's concessions with regard to wages and union security were significant enough to reasonably suggest that further concessions might be forthcoming. The Respondent's conclusion that a deadlock existed in the face of such concessions is unwarranted, particularly since the Union's proposal of April 15, which contained concessions, was its initial response to Respondent's first and only wage proposal.

In these circumstances, we find the parties were not at impasse when Respondent instituted unilateral wage increases, and that Respondent's action, therefore, circumvents the duty to bargain in violation of Section 8(a)(5) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Saunders House a/k/a The Old Man's Home of Philadelphia, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

[5] *Taft Broadcasting Co., WDAF AM-FM TV*, 163 NLRB 475, 478 (1967), enfd. *sub nom. American Federation of Television and Radio Artists, AFL-CIO, Kansas Local* v. *N.L.R.B.*, 395 F.2d 622 (D.C. Cir. 1968).

[6] The Respondent contends that this is not a concession on the Union's part because it had been aware that such a proposal was acceptable after the February 20 meeting. We disagree. The Union's wage offer of April 15 offered now "on the record" and in conjunction with other proposals was a new offer on the Union's part and one showing a significant concession.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge: This case was heard at Philadelphia, Pennsylvania, on March 10, 1982. The charge was filed on April 22, 1981, by District 1199C, National Union of Hospital and Health Care Em-

ployees, Division of RWDSU, AFL-CIO (herein the Union). The complaint, which issued on October 27, 1981, alleges that Saunders House, a/k/a The Old Man's Home of Philadelphia (herein the Company or Respondent), violated Section 8(a)(5) and (1) of the National Labor Relations Act. The gravamen of the complaint is that on or about April 22, 1981, the Company granted wage increases of up to 6 percent to employees in the appropriate bargaining unit, allegedly without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the unit employees with respect to such matter. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel, the Company, and the Union each submitted a brief. The Company also submitted proposed findings of fact, and a request that certain portions of the briefs submitted by the General Counsel and the Union be disregarded.

Upon the entire record in this case[1] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs and other submissions of the parties, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a nonprofit Pennsylvania corporation, is engaged in the business of providing long-term health services at its Philadelphia, Pennsylvania, facility. In the operation of its business, the Company annually receives gross revenues in excess of $1 million and annually purchases and receives goods and materials valued in excess of $50,000 from firms within Pennsylvania which in turn purchased and received such goods and materials directly from points outside of Pennsylvania. I find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. See *East Oakland Community Health Alliance, Inc.*, 218 NLRB 1270, 1271 (1975).

II. THE LABOR ORGANIZATION AND THE BARGAINING UNIT INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act. On August 28, 1980, following a Board-conducted election on July 3, 1980,[2] the Union was certified as collective-bargaining representative of the employees in the following appropriate unit:

> All full and regular part time service, maintenance and technical employees including dietary, housekeeping, maintenance and nursing including nursing aides, licensed practical nurses and licensed graduate practical nurses employed by the Company at its Lancaster Avenue and City line Avenue, Philadelphia, Pa. facility; excluding all other employees including professionals, managers, chefs, registered nurses, office clerical, guards and supervisors as defined in the Act.

The Company in its answer denies that the Union is the collective-bargaining representative of the unit employees. No evidence was offered in support of the Company's position in this regard. However I was informed off the record that decertification petitions were dismissed by reason of the present proceeding.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

This case presents threshold questions as to the extent and manner in which the evidence adduced in this proceeding, and in particular, the course of negotiations between the parties, may be considered with respect to the ultimate issue of whether the Company granted wage increases on April 22, 1981, without affording the Union an opportunity to negotiate and bargain with respect to such increases. Before addressing these questions, and the ultimate merits of the case, I shall first review the operative facts; i.e., the course of contacts and negotiations between the Company and the Union during the period from July 1980 to July 1981, and the Company's actions with regard to the matter of wages during this period.

By letter dated August 12, 1980 (after the election but before certification), Union President Henry Nicholas requested contract negotiations and also requested the Company to furnish certain information. By letter dated August 13 which crossed in the mail, company attorney Frank Abbott, who subsequently served as the Company's chief negotiator throughout the unsuccessful contract negotiations, informed union attorney Miriam Gafni that the Company intended to implement an 8-percent wage increase for each unit employee, effective August 29 and retroactive to July 1. Abbott informed Gafni that this would be similar to increases previously given to the Company's nonunit supervisory and administrative personnel. Abbott testified that the Company did not previously implement these increases for the unit employees because of concern that the Union might file objections or unfair labor practice charges and the election would be set aside. By letter dated August 15, Gafni told Abbott in sum, that any wage increase would have to be negotiated, that Nicholas had requested negotiations, that Nicholas was the Union's chief negotiator, and that the

[1] The General Counsel, the Company, and the Union have each filed a motion to correct transcript. The motions coincide in some respects, but also conflict in a few respects. My rulings are contained in a separate order annexed to this Decision [omitted from publication]. With regard to requested corrections on pp. 54 and 63, my independent recollection is, and my notes so indicate, that the witness said "four per cent" and not "forty cents." With regard to requested corrections on pages 136 through 139, I find that corrections are warranted in the context of the documents referred to by the witness. In resolving conflicts over statements made or questions propounded by counsel during the course of the hearing, I have proceeded on the premise that the attorney who made the utterance is in the best position to know what he or she said. In the absence of any position by counsel for the General Counsel as to his precise words p. 153, L. 7, of the transcript, and in the absence of any independent recollection by me of his precise words, I am leaving the transcript uncorrected in this regard. However it is evident that he was referring to the present charge.

[2] All dates herein are for the period from July 1, 1980, through June 30, 1981, unless otherwise indicated.

Company should submit its request to Nicholas. That same day (August 15) the Company sent a written notice to each of the unit employees, with a copy of Abbott's August 13 letter attached to each notice. The Company asserted that "[b]ecause of the recent election we felt that the law prevented us from passing on this well-deserved increase previously," and that "[a]ssuming that the union does not object, your next paycheck will be based on your new pay rate." By letter dated August 21 to Nicholas, Abbott responded to Nicholas' letter of August 12 and Gafni's letter of August 15. Abbott asserted that the requested information was being compiled, that because of the Union's objection the Company would not implement the wage increase, and that Nicholas should call him to arrange a meeting. (There is no contention in this case that the requested information was not furnished.) Thereafter Nicholas and Abbott arranged for negotiations to commence on September 16. In the meantime, on August 25, the Company sent another notice to its employees, this time with a copy of Gafni's August 15 letter attached to each notice. The Company asserted that "[w]e had hoped to implement your increases," but "we have been prevented by the Union from effectuating your increases, and [w]e hope to be able to give you the increases in the near future."

On September 9 the Union forwarded its initial proposed contract (identified in the record as Jt. Exh. 5(b)) to attorney Abbott.[3] The Union proposed, *inter alia*, full union security and checkoff of union dues and initiation fees. On wages, the Union proposed a $40-per-week wage increase "to be applied across the board and in the minimum job rates" (effective date not indicated). The Union also proposed cost-of-living increases (COLA) on a scale ranging up to a maximum of $5 per week. The proposed contract was open as to duration.

The parties met in six negotiating sessions during the period from September 16 to April 15. After the wage increases which are the subject of this proceeding, the parties met in two more sessions (July 29 and August 25, 1981). However no evidence was introduced as to the substance of those last two sessions. As indicated, attorney Abbott was the Company's chief negotiator throughout the negotiations. Union President Nicholas was the Union's chief negotiator during the first three sessions. Union Executive Vice President Donna Ford replaced Nicholas at the fourth session on October 29, and continued as chief negotiator until Nicholas returned to the negotiations in March 1981. Nicholas, Ford, and Abbott were the only witnesses to testify in this proceeding. The General Counsel presented Nicholas and Ford as witnesses, and the Company presented Abbott as its witness.

The testimony of Nicholas and Abbott is partially in conflict concerning the first session on September 16. According to Abbott, he asked if the Union were still opposed to the 8-percent increase. Nicholas answered that they were unless the increase was part of an overall contract package. Nicholas pointed out that the Union had just submitted an economic proposal. Abbott testified that he restated the Company's position as set forth in his August 13 letter to attorney Gafni and suggested that the parties were at "impasse." According to Abbott, Nicholas agreed with this assessment. Abbott promised to submit the Company's proposed contract at the next session. Nicholas testified that Abbott proposed the wage increase on a "take it or leave it" basis, asserting without explanation that the Union had prohibited the employees from getting it. According to Nicholas, Abbott said nothing at this meeting about the Company having given a raise to nonunion personnel or delaying an increase for unit employees because of the election. Nicholas testified that when Abbott suggested they were at impasse, he disagreed, arguing that there could be no impasse because the increase would be a gift and not a part of the negotiations.

I credit Abbott's version of the September 16 session. His version is more credible than that of Nicholas. If Abbott, as testified by Nicholas, had asserted that the Union prohibited the employees from getting a wage increase, then it is probable that Nicholas would have asked for an explanation, and it is also probable that Abbott would have given an answer which included the reasons previously asserted by Abbott in his letter to Gafni. If Nicholas had denied that there was an impasse, then it is unlikely that the Company would (as it did) implement the increase on September 26 without even mentioning the matter at the second session on September 24. Additionally, the Company's announcement and explanation of the increase (which will be described, *infra*) were consistent with Abbott's version of the September 16 session, but not with that of Nicholas. If Nicholas had asserted that the increase should be regarded as a gift, then it is probable that the Union would have expressed its disagreement with the Company's explanation, by way of communication to the Company or the unit employees or both. However there is no evidence that it did so.

On September 19 the Company submitted its initial proposed contract to the Union. The proposal did not provide for either union security or checkoff, and did not contain any wage proposal. On wages, the Company indicated that its wage proposals would follow. The proposed contract was open as to duration, although it indicated that the effective date would be in 1980 and the terminal date in 1981. At the second session on September 24 the parties discussed the Company's proposed contract. Nicholas indicated which proposals were acceptable to the Union and which were objectionable. At this session and thereafter, the Company asked to defer discussion of economic matters. There was no discussion about the proposed 8-percent wage increase or the Union's economic proposals. However, on September 26 the Company, without further notice to the Union, granted an 8-percent wage increase to the unit employees, retroactive to July 1, 1980. The increase was identical with that given to nonunit personnel on July 25,

[3] Another union-proposed contract (Jt. Exh. 9) was also presented in evidence, but without stipulation as to the date of its submission. Nicholas testified without contradiction that Jt. Exh. 9 was the Union's original proposal. Jt. Exh. 9 contains the same wage proposal as Jt. Exh. 5(b), but it also contains language which was obviously taken from the Company's initial proposed contract. It is evident that Jt. Exh. 9 was prepared during negotiations and reflects acceptance of some of the Company's proposed language. I find that Jt. Exh. 9 was submitted to the Company some time between September 24, (the second bargaining session) and December 2, when the Union first revised its wage proposal.

1980. The Company informed the unit employees that "the Union wanted us to wait until the end of negotiations," but "we feel that you should not have to wait any longer." The Union filed an unfair labor practice charge regarding the increase. Subsequently, the General Counsel and the Company, over the Union's objection, executed an informal Board settlement agreement in the matter. The settlement agreement was not presented in evidence in this proceeding.

At the third session on October 8, the parties went through the various provisions of their respective proposals. Nicholas informed Abbott that the Federal Mediation Service (FMC) had assigned Commissioner Christine Sickles to the negotiations. Thereafter Sickles was in attendance at the negotiations, which were conducted at the FMC offices. (The first three sessions were held at Abbott's law offices.) At the fourth session, Donna Ford replaced Nicholas as the Union's chief negotiator. According to Abbott, the parties were moving slowly but making some progress on matters of language. At the fifth negotiating session on November 5 and the sixth session on November 12, the parties again discussed matters of language. There were concessions by both sides. At the seventh session on November 24, Mediator Sickles spoke privately to Ford and Abbott. Sickles said that they were not making much progress, and asked what could be done to speed up the negotiations. Ford said that the Company had to do something on wages, union security, and checkoff, and, until the Company moved on these matters, there would not be much progress. When they returned to the full session, Ford asked for the Company's position on wages, union security, and checkoff. Abbott asserted that the parties had discussed wages, that the Company had promised to submit a proposal, and that the Company would submit a wage proposal at the next session. As to union security and checkoff, Abbott said, "the answer is still, no." Ford replied that she could not proceed further until the Company moved on these matters. In fact, except for the discussion at the first session concerning the proposed 8-percent wage increase, there had been no substantive discussion whatsoever concerning the matter of wages. Indeed, Abbott conceded in his testimony that the Company did not even consider the Union's initial wage proposal. Abbott testified that he said nothing about the Union's proposal for a $40-per-week increase because "I never took that serious"; and with respect to Ford's complaint that the Company never made a proposal on wages: "let's say that I never considered them as having made a proposal either." As to union security and checkoff, there was only minimal testimony concerning the substance of the parties, discussions; i.e., the reasons given by them in negotiations for their respective positions. Nicholas testified that the Union regards union security as the "salvation of the union," and so made clear to the Company. According to Nicholas, the Union (as will be discussed, *infra*) subsequently proposed a modified form of union security, in order to avoid a strike. The only evidence presented concerning the Company's asserted reasons for rejecting union security and checkoff consists of a letter from the Company to the unit employees, dated March 25, 1981, and a letter sent by Abbott to the Board's Regional Office in connection with the investigation of the present charge. In the former, the Company asserted that it "took the position that we will not agree to union security because we feel that people do not have to join the Union to work at Saunders House," and that on dues checkoff "we do not feel that it is Saunders House's responsibility to take dues out of any employee's pay and send it to the union." In his letter to the Regional Office, attorney Abbott set forth the Company's asserted position before a board of inquiry (Rev. Dr. Francis X. Quinn, chairman), on March 16, 1981. According to Abbott:

> The parties met in Federal Mediation again on March 30, 1981 to consider Dr. Quinn's report. At that meeting both parties agreed that they were at impasse. Saunders had pointed out to Dr. Quinn on March 16th that, as of March 10, 1981, 29 employees who had voted no longer were employed at Saunders and had been replaced. As a result, not knowing the desires of those employees and knowing that many of its employees had not wanted to join the Union at the time of the election, Saunders informed Dr. Quinn that it did not wish to agree to require any of its employees to become members of the Union, nor would Saunders collect dues for the Union. Saunders indicated it had no objection to employees voluntarily joining the Union since that was their right. Saunders maintained this position.

At the eighth session on December 2, each side orally submitted a wage proposal. The Union proposed across-the-board wage increases of $20 per week, effective September 1980, $18 per week effective September 1, 1981, and $18 per week effective September 1, 1982, plus a cost-of-living adjustment in the second year of the contract. The Company proposed a 1-year contract, effective as of the date of ratification, and a cost-of-living adjustment, effective July 1, 1981, in accordance with the formula set forth in the Union's proposed contract.[4] According to Ford, the Company said that they were not prepared to discuss wages; that "anything they agreed upon" would be effective upon the date of the contract, and that they would be willing to include a cost-of-living increase in the second year of contract. Abbott, in his testimony, denied that he said anything about a wage increase to be granted at the time the contract was ratified. (Indeed, Ford did not testify that Abbott expressly made such a reference.) However Abbott did not deny the balance of Ford's testimony. I credit Ford's testimony that the Company said that they were not prepared to discuss wages. I find that the Company thereby precluded any meaningful discussion and negotiation concerning the wage proposals which were on the table. I further find that the Company thereby also led the Union to believe that the Company's wage proposal was incomplete.

[4] Abbott initially testified that he opened the December 2 session by submitting the COLA proposal. However on cross-examination Abbott testified that he was not sure whether he made the proposal on December 2 or on December 8. I find, as indicated by the testimony of Ford, that the Company submitted its proposal in response to the Union's proposal.

The evidence fails to indicate that wages were discussed at the 9th session on December 8, the 10th session on December 22, or the 11th session on January 26. Ford testified that neither party submitted or proposed anything on wages at these meetings, and Abbott did not testify concerning the three meetings. Ford's testimony concerning the 12th session on February 6 was undisputed. Ford and Abbott discussed where the parties stood. Ford outlined those issues which were important to the Union, and described as "crucial," union security, checkoff, union visitation, sick leave, and wages. According to Ford, "we agreed that we would put together a proposal as to where each party was; and that he [Abbott] was going to go back and talk to his clients in reference to those areas that were of importance to us and that I was to meet him at his office to review it."

Pursuant to their agreement, Ford and Abbott met alone in Abbott's office on February 20.[5] In contrast to the February 6 session, the testimony concerning this meeting is sharply disputed. According to Ford, the meeting lasted about 10 minutes, Abbott said that he could not get the Company to move on anything and suggested another session, and the parties did not discuss wages or any other specific matter. Abbott testified that the meeting lasted about one-half hour. According to Abbott, the parties reviewed their positions. Ford said that she would recommend to the membership a contract which contained modified union security, checkoff, and three successive annual wage increases of 8-percent each. Abbott further testified that he told Ford he would discuss her position with the Company, but that the Company probably would not agree, and that he would present a wage proposal at the next bargaining session. (In fact, the Company did present a wage proposal at the next session.) It is undisputed that Abbott never mentioned the February 20 meeting in subsequent negotiations, or in the board of inquiry proceeding, or in the letters which he sent to the Regional Office in connection with the investigation of this case. Abbott explained that he regarded the meeting as "off the record," i.e., "in confidence," and that he would not even have mentioned the meeting in this proceeding if Ford had not testified concerning the meeting.

I credit Abbott. Specifically, I find his version of the February 20 meeting to be more plausible than that of Ford. It is unlikely that Abbott would have gone ahead with the meeting if he had nothing more to say than that the Company was not willing to move on anything. Rather, it is more probable that Abbott would have simply telephoned Ford and told her of the Company's position. It is also unlikely that Abbott would have told Ford that the Company was unwilling to move on anything and then (as he did) present a new wage proposal at the next bargaining session. Additionally, it is evident that Ford and Abbott attached particular importance to their private meeting. In these circumstances, it is unlikely that they would have utilized the meeting simply to speak in generalities, without discussing their positions on specific important issues, and, in particular, wages, union security, and checkoff.[6] I find that at the February 20 "off the record" meeting, Ford informally indicated to Abbott what she thought would be the Union's bottom line for an acceptable contract. The significance of this meeting will be further discussed at a later point in this Decision.

On February 26 the Union gave written notice to the Company of its intent to strike (pursuant to Sec. 8(g) of the Act). However the Union never struck the Company. At the 13th negotiating session on March 2, the Company presented a revised proposed contract, including a proposed wage schedule.[7] The Company proposed a termination date of September 30, 1981. The Company's wage proposal indicated an effective date of March 12, 1981. Therefore the Company was proposing a contract of about 6-1/2 months duration, or less, depending on the length of negotiations. The revised proposed contract reflected some concessions on matters of language, but did not provide for either union security or checkoff. The Company's wage proposal was set forth in terms of rates of pay by job classification and for each individually named employee in the unit. Abbott explained that, under the proposal, the Company would give individual raises, effective March 12, 1981, and averaging 6-1/2 percent, and would give a general 6-percent increase to all unit employees effective July 1, 1981. The general increase would be *in lieu* of the Company's former proposal on COLA, and would not apply to job rates in the progression scale. The proposed March 12 raises varied widely, ranging from 55 cents per hour down to nothing. Among the approximately 165 unit employees, 14 would receive no raises and 32 would receive raises of 10 cents or less per hour. For a few employees, the raises amounted to more than 10 percent. However, according to Union President Nicholas, he analyzed that about 20 percent of the employees would receive raises of less than 4

[5] The meeting was initially scheduled for February 11. Abbott testified that Ford canceled the earlier date. Ford testified that Abbott canceled the February 11 meeting, apparently because he was angry over remarks made by Union President Nicholas at a meeting with employers, concerning alleged problems with employer attorneys. I find it unnecessary to resolve this conflict in testimony.

[6] I am not persuaded by the arguments advanced by the General Counsel and the Union as to why I should credit Ford rather than Abbott. The Union argues (br., p. 10) that "it is hardly imaginable that the union would have offered a package of 8 %, 8 % and 8 % when there wasn't one penny on the table from the Employer for any of the periods in question" and the Company was proposing a 1-year contract. In fact, there was a company wage proposal on the table at this time, and the Union previously reduced its wage demands at a time when the Company had not presented any wage proposal. It is not inherently improbable that one negotiator would, in confidence, indicate to the other negotiator a probable "bottom line" for the conclusion of negotiations, nor is it improbable that the other negotiator would honor such confidence and thereafter not mention their conversation in subsequent negotiations or proceedings. Moreover, Abbott's letters to the Regional Office, like company counsel's opening argument in this proceeding, did not purport to set forth a detailed recitation of the negotiations from the Company's point of view. Rather they simply contained a brief statement of the Company's position, principally that the parties themselves agreed that there was an impasse. Therefore, even if Abbott were inclined to divulge his confidential conversation with Ford, I would not regard the absence of any reference to the February 20 meeting as an admission that the meeting did not take place as described by Abbott in his subsequent testimony.

[7] Ford testified that the Company presented only the wage proposal at the March 2 session, and first presented the balance of its revised proposed contract at the board of inquiry hearing on March 16. Her testimony was contrary to the stipulated evidence.

percent. Abbott asserted that the Company had made a study of wage rates and, based on the results of the survey, wished to upgrade employees where inequities existed. Abbott wanted to proceed through the proposal, discussing each individual employee, but Ford indicated that the Union wanted to study the proposal. A session was scheduled for March 5. However Ford indicated that the Union could not accept any proposal which failed to provide for increases for all employees, and also that the Union did not agree with the proposed job rates.

Abbott testified that the proposed contract which he submitted to the Union at the March 2 session was the Company's "final offer," and the Company so informed the employees by letter the next day. (The letter also informed each employee of the increase or increases which he or she would receive under the Company's proposal.) In sum, the Company's first and only comprehensive wage proposal was, by the Company's own assertion, part of its "final offer," and was submitted at the first bargaining session at which the Company even impliedly indicated that it was prepared to discuss the entire matter of wages.

At the 14th negotiating session on March 5, Ford orally presented what she described as the Union's "final offer" on wages. Ford proposed an 8-percent wage increase effective on September 16, 1980, a 10-percent increase effective on July 1, 1981, and a 10-percent increase effective on July 1, 1982. Ford said nothing about COLA, and Abbott assumed that the Union was dropping its demand for COLA. Abbott did not comment or ask questions about the Union's proposal, other than to state that there was no change in the Company's position. Abbott testified that he knew by reason of his meeting with Ford on February 20 that this was not the Union's final offer, and that the Union would come down on wages and also move on union security. At the close of the March 5 session, mediator Sickles informed the parties that FMC would appoint a board of inquiry, and that the Board would conduct a hearing on March 16.

Dr. Quinn presided at the board of inquiry hearing. Union President Nicholas spoke on behalf of the Union. Nicholas presented the Board with the Union's last written proposed contract (Jt. Exh. 9) and with a typed outline of what he regarded as the unresolved issues between the parties (Jt. Exh. 10). The outline indicated in sum that the outstanding items included full union security, checkoff, superseniority for delegates, vacation (number of days), holidays (three issues), grievance procedure (guaranteed bearing at each step with no loss of wages), wages, successorship, union activity (including compensation), recognition (definition of part-time employees included in the unit), hours of work (concerning weekend work and grace period for tardiness), overtime (counting holidays as time worked), probationary employees (length of probationary period), sick leave (four issues, including sick leave from first day of illness vs. third day of illness), paid leave (two issues), leave of absence (extent of employer discretion and rights on return), and contract termination date. (The Union wanted a termination date of September 1, 1982.) The parties were also in disagreement on two noncontractual union demands; namely, reinstatement of two terminated employees (Cox and Taylor) and compensation for members of the Union's negotiating committee. On wages, the Union indicated (notwithstanding its March 5 proposal) that it was seeking annual raises of 8, 10, and 10 percent *plus* COLA.Nicholas then made an oral presentation. He asked the board to limit its recommendations to the matters of union security, checkoff, union visitation rights, grievance procedure, wages, contract duration, and reinstatement of Cox and Taylor. Nicholas indicated that if the Union "could get a green light on those issues," i.e., if the board recommended the Union's position on those issues and the Company accepted that recommendation, the Union would, as Nicholas put it, "take the contract and run like a thief with it." Abbott then made a presentation on behalf of the Company. He furnished the board with the Company's March 2 proposed contract. Abbott clarified the Company's position in certain respects, but did not indicate any willingness to move from its March 2 proposal. On March 20 the board of inquiry issued its written factfinding report, including nonbinding recommendations. The board recommended a contract termination date of August 31, 1982, modified union security, checkoff of dues and initiation fees, and an 8-percent across-the-board increase effective on September 1, 1981.[8] The Board did not make recommendations on any other issues.

By letter dated March 25 (mentioned, *supra*, in connection with the Company's position on union security and checkoff), the Company informed the employees that it was unable to implement its proposed wage increases because the Union did not accept the Company's wage offer. Ford and Abbott were the chief negotiators at the 15th bargaining session on March 30. Ford indicated that the board of inquiry recommendation on wages was unacceptable to the Union, but that the Union could go along with modified union security. There was no express reference to contract duration or reinstatement of Cox and Taylor. According to Abbott, Ford said that the Union would agree to a modified union shop if the Company agreed to the balance of the Union's proposals as set forth by Nicholas in his oral presentation to the board of inquiry. Abbott responded that the Union had the Company's "final position." He asserted that the Company's wage proposal was more favorable to the employees than the recommendation of the board of inquiry. In her investigatory affidavit, Ford stated that she told Abbott that, if the Company accepted the board of inquiry recommendations, the Union would discuss the remaining open issues. However in her testimony she admitted that this was not true. I credit Abbott.

Nicholas and Abbott were the chief negotiators at the 16th negotiating session on April 15. Ford was also present. This was the last session before the Company implemented its proposed individual wage increases. Nicholas presented a written document purporting to set forth "recommendations . . . as a way to end the impasse between the parties . . . in the hope of reaching a

[8] On union security, the Board recommended a clause which would exclude from the requirement of union membership nonmembers actively employed by the Company on the effective date of the contract.

conclusion to the longest negotiations in the Union's history." The Union proposed modified union security, checkoff as originally proposed by the Union, general wage increases of 8 percent, effective respectively on September 16, 1980, July 1, 1981, and July 1, 1982 (no mention of COLA), guaranteed hearings at each step of the grievance procedure, the Union's proposed language on union activity (art. 20), and sick leave beginning on the first day of illness. Nicholas also made an oral presentation of the "recommendations." Nicholas confirmed that he was dropping the demand for COLA, and that, if the Company accepted these proposals, the Union would accept the Company's proposals in all other respects and thereby conclude the negotiations. Abbott asked whether the Union's proposal on sick leave was based on the Union's proposed article or the Company's proposed article (with sick leave from the first day instead of the third day of illness). Nicholas answered that it was the Company's article. Abbott also asked for clarification on the grievance procedure. Nicholas answered that the Union wanted, at step 2, employee opportunity to meet with the personnel director, and, at step 3, employee opportunity to meet with the executive director. There was no other discussion of substantive matters. The Company caucused, and then told the Union that it wanted to study the proposal, and would get back to the Union. In fact, as admitted by Abbott in his testimony, the Company had already decided to reject the proposal. According to Abbott, the Company concluded that there was nothing new in the Union's proposal because (1) the Company knew that modified union security was available, (2) the Union had always wanted checkoff, (3) the Company had long known that the Union would settle for three 8-percent wage increases, (4) the Union's proposal on grievance procedure was "not clear to us," (5) the Union had insisted all along on its proposed article on union activity, and (6) the Union's proposal on sick leave also did not reflect any change in the Union's position.

As to sick leave, Abbott was equivocal about the extent of prior agreement. Abbott testified that the parties were in "basic agreement" on most aspects of sick leave, but he subsequently testified that he did not know whether, as of March 16, there was agreement on all aspects of sick leave except first day vs. third day of illness. In fact, as indicated by Nicholas' outline of issues, and as further indicated by a comparison of the parties' proposed contracts (art. 11 in both proposals) the parties differed on four matters under sick leave. Indeed, Nicholas understated the extent of the difference. (Nicholas indicated that the Union wanted 12 days per year and the Company was proposing 10. In fact, as testified by Donna Ford, the Company was proposing 7 days.) In Nicholas' oral presentation to the board of inquiry, he did not include sick leave as one of the crucial demands. However, on April 15 he lowered the amount of the wage proposal and dropped the demands for COLA and for reinstatement of Cox and Taylor. Also, on March 30 the Union indicated that it would agree to modified union security. On grievance procedure, the Union, in response to the Company's inquiry, explained its proposal. What is mystifying, however, is that the language of the company and union proposals on steps two and three of the grievance procedure are identical. Neither expressly spells out a right to a meeting. Even the Union's initial proposed contract did not expressly spell out such a right. It may be that the Union interpreted the language as providing such right. However the Company did not inquire into this problem. Instead, as indicated by Abbott's testimony, the Company dismissed out of hand the Union's proposal for language identical to that in the Company's proposed contract, simply because the Union's proposal was "not clear to us." On union activity, the areas of difference concerned the extent of access and compensation for time spent on union activity. As to wages, the proposed 8-percent wage increases would constitute nothing new only if Ford's "off the record" conversation with Abbott constituted a union proposal. However, the Company never acknowledged it as constituting a proposal and never discussed it with the Union.

By hand-delivered letter dated April 16 to Nicholas, Abbott asserted that the Company had considered the Union's "recommendations," that they represented no change in the Union's position, except for guaranteed hearings under the grievance procedure, that the Company's proposed article on union activity adequately covered that point, and that "our offer remains unaltered." Abbott stated that the parties agreed that they were at impasse, and that the Company would implement wage increases and other elements of its proposal unless the Union accepted that proposal by April 22. By letter dated April 20, Nicholas disagreed with Abbott's assertion that there was no change in the Union's position, and objected to any "unilateral" wage increase, arguing that such would constitute an unfair labor practice. Abbott attempted to reach Nicholas by telephone on April 21 and 22. He was unsuccessful, and on April 22 he sent a hand-delivered letter to Nicholas which substantially restated the Company's position as set forth in Abbott's April 16 letter. By hand-delivered letter dated April 22 to Abbott, Nicholas restated the Union's position. Nicholas testified that he did not return Abbott's phone calls because he wanted his answer to be "on the record." As the Company did not offer to resume negotiations, I attach no significance to Nicholas' failure to return Abbott's calls.

The complaint alleges and the answer admits that, on or about April 22, the Company granted wage increases of up to 6-percent to employees in the bargaining unit. There were no further bargaining sessions until July 29, 1981. In the meantime, by letter dated July 1, 1981, Abbott informed Nicholas that notwithstanding the Company's last offer of a 6-percent wage increase effective July 1, 1981, the Company intended to give an 8-percent increase to nonunit personnel effective as of that date, and wanted to give the same increase to the unit employees. This was also the same increase which the Union had proposed at the April 15 session. Abbott added that "[if] you have any comments concerning this matter, please advise us before July 10, 1981." Abbott gave no explanation as to why the Company did not previously offer or agree to an 8-percent increase effective

on July 1, 1981. By letter dated July 6, 1981, attorney Gafni, on behalf of the Union, told Abbott that there was no impasse, and that any unilateral increase in benefits without prior negotiations would be unlawful. Gafni requested resumption of contract negotiations. No evidence was presented as to whether the Company implemented any wage increases, or as to what if any substantive negotiations took place thereafter between the parties.

B. *Analysis and Concluding Findings*

1. The extent to which the course of negotiations and the Company's actions may be considered in this proceeding

The General Counsel and the Union allege in their respective briefs that the April 22 wage increase was unlawful, *inter alia*, because the Company engaged in bad-faith bargaining. The Company has requested that I disregard that argument, on the ground that good faith is not an issue in this proceeding.

On June 8, 1981, the Board's Regional Director informed the Company and the Union that he would not proceed on allegations of the present charge other than the allegation that the Company unlawfully unilaterally instituted its wage proposals. Specifically, the Regional Director administratively found, as lacking in merit, allegations that the Company "bargained without any intention of reaching agreement," and improperly "dealt directly with the employees," by its letters to the employees in March 1981. The present record does not indicate that the Union requested the Board's General Counsel to review the Regional Director's action. During the opening arguments in this proceeding, counsel for the General Counsel asserted that "there was good faith bargaining" but "no impasse," that he would focus on wages, that the September 1980 wage increase was not the subject of this proceeding, and that he was not alleging any unlawful increase in July 1981. However company counsel argued that he had "no problem with developing the totality of negotiations because I think that under the leading Board cases, to discover whether any impasse exist[s] as to any subject, you must look at the totality of negotiations." Indeed, the Company took this approach in its brief.

The principal difficulty with the Company's present request to exclude good faith as an issue is, as the Company has acknowledged by its arguments, that good faith is an element which must be considered in determining whether the Company acted lawfully in implementing the April 1981 wage increases. The present complaint alleges that the Company violated Section 8(a)(5) and (1) of the Act by granting the wage increases "without having afforded the Union an opportunity to negotiate and bargain" regarding the grant of those increases. Essentially, the factual question presented by the evidence is whether the Company was privileged to make those wage changes by reason of an impasse in bargaining. As a general rule, an employer is permitted to make unilateral changes in terms and conditions of employment when there is an impasse in negotiations regarding the subject matter or matters in question; i.e., when despite their best efforts to achieve agreement with respect to such matters neither party is willing to move from its respective position. *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), reversed on other grounds 500 F.2d 181 (5th Cir. 1974). However such changes must be reasonably comprehended within the employer's preimpasse proposals. Whether such an impasse exists is a matter of judgment. The relevant factors in making that judgment include the bargaining history, the good faith of the parties in negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co., WDAF AM-FM TV*, 163 NLRB 475, 478 (1967), affd. *sub nom. American Federation of Television and Radio Artists, AFL-CIO, Kansa City Local* v. *N.L.R.B.*, 395 F.2d 622 (D.C. Cir. 1968). Therefore, good faith must be considered in determining whether there was an impasse, and consequently on the ultimate merits of the complaint. The Company is not prejudiced by the permissible scope of inquiry. As indicated, the Company made clear in its opening argument that it understood the "totality of negotiations" to be a proper area of inquiry in this proceeding, and that it was prepared to litigate the case on that basis. Therefore the Company was on notice that its course of dealings with the Union was an issue and might give rise to the finding of a violation of its duty to bargain. See *Griffin Inns, Owner and Operator of Sheraton Motor Inn (Woodhaven, Michigan)*, 229 NLRB 199 (1977). I find that the permissible scope of inquiry in this proceeding includes the entire course of negotiations between the parties and the Company's related actions which were the subject of testimony or other evidence, from July 1980 through July 1981. This includes the September 1980 wage increase, because evidence in a settled case may properly be considered as background evidence in determining the motive or object of a respondent in activities occurring either before or after the settlement, and which are in litigation. *Steves Sash & Door Company* v. *N.L.R.B.*, 401 F.2d 676, 678 (5th Cir. 1968). However, the statements made by the General Counsel in its opening argument may be and have been taken into consideration as admissions against interest.

2. The merits of the present complaint

Notwithstanding the foregoing discussion, a finding of unlawful conduct is warranted in this case, even if the complaint were construed in its most literal or technical sense. Specifically, the Company acted unlawfully because it never negotiated or bargained with the Union over the matter of wages, or even afforded the Union an opportunity to negotiate or bargain about wages. This is true, whether the subject matter in question is viewed as wages or as a particular wage increase. When the Union submitted its initial proposed contract, including wage proposals, the Company asked to defer discussion of economic matters (notwithstanding that it had already implemented its own proposed wage increase). The Company continued to adhere to this position until the eighth session on December 2, when the Union substantially reduced its wage proposal and the Company submitted a

proposal on wages. In the meantime, as admitted by attorney Abbott, the Company did not even bother to consider the Union's initial proposal. On December 2 the Company again asked to defer the matter of wages by asserting that it was not prepared to discuss wages, and by leading the Union to believe that its wage proposal was incomplete. Thereafter there was no specific discussion of wages until the "off the record" meeting between Abbott and Ford on February 20. The Company never responded to Ford's statements at this meeting. However, according to the testimony of Abbott, the Company never considered any union wage or proposal which called for anything more than three annual wage increases of 8 percent each, because the Company knew that the Union would settle for less. When (on March 2) the Company finally got around to presenting its wage proposal, the proposal was presented as a nonnegotiable item. Specifically, the Company presented its wage proposal on a take-it-or-leave-it, all-or-nothing basis, as part of the Company's "final" proposed contract. At the next session on March 5, the Union presented what it described as its "final offer" on wages. However, the Union subsequently indicated that the offer was not final, and that the Union was willing to reduce its demands in order to reach an agreement. In contrast, the Company on and after March 2 indicated that it meant what it said, and that it would consider nothing less than union acceptance of its entire proposed contract of March 2. On April 15 the Union proposed what Abbott allegedly knew all along to be the Union's bottom line on wages. However, the Company did not even bother to respond to the proposal. Instead, the Company falsely told the Union that it wanted to study the proposal, although in fact the Company had already decided to reject the Union's proposal in its entirety. The next day the Company informed the Union by letter that it would implement its own wage proposals unless the Union accepted the Company's entire proposed contract.

The Company cannot have it both ways. If, as indicated by Abbott's testimony, the February 20 meeting was "off the record," then Abbott should have disregarded the meeting and negotiated with the Union about those proposals which were presented at the bargaining table. If Ford's statements constituted a union proposal, then the Company was obligated under law to negotiate with the Union about this proposal. Instead, the Company did not pursue either alternative. A party does not meet its bargaining obligations under the Act by simply considering only its own proposals, or by consulting with its own chief negotiator. Nor does a party meet its bargaining obligations by avoiding a response at the bargaining table, and, instead, presenting its position by way of a written ultimatum. Rather, as the Board has made clear:

> Bargaining presupposes negotiations—with attendant give and take—between parties carried on in good faith with the intention of reaching agreement through compromise. . . .
>
> Clearly this duty requires more than going through the motions of proffering a specific bargaining proposal as to one item while others are undecided and merely giving the bargaining agent an opportunity to respond. Such tactics amount to little more than a ritual or *pro forma* approach to bargaining and hardly constitute the "kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement."

Dilene Answering Service, Inc., 257 NLRB 284 (1981), citing *Winn Dixie Stores, Inc.*, 243 NLRB 972 (1979).

Here, throughout the entire course of negotiations the Company avoided or rejected any meaningful discussion or negotiation concerning agreement on wages. Therefore, if for no other reason, there was no impasse in negotiations concerning wages, and the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the proposed wage increases. The matter of wages was a crucial issue, and was one of only a handful of items which separated the parties as of April 15. Meaningful bargaining regarding wages might well have led to agreement on the remaining issues. Moreover, a party is obligated to bargain in good faith concerning a particular subject matter, such as wages, even if there is a genuine impasse in negotiations with respect to other matters. See *N.L.R.B.* v. *Tomco Communications, Inc.*, 567 F.2d 871, 881–882 (9th Cir. 1978). In fact, the Company's failure and refusal to meaningfully discuss the Union's wage proposal of April 15 also extended to other aspects of the Union's proposals, including the important issue of union security. As indicated, attorney Abbott stated that he told the board of inquiry on March 16 that the Company opposed union security and checkoff because it did not know the desires of employees hired since the election, and it also knew that many of its employees had not wanted to join the Union at the time of the election. The board of inquiry's recommendation of modified union security, and the Union's subsequent acceptance of this recommendation in the form of its own proposal, was directly addressed to the Company's professed concern, and reflected a substantial departure from the Union's original proposal for full union security. Nevertheless the Company did not even bother to reply to the Union's significant movement in this area. Rather, when the Union first proposed modified security (March 30), Abbott simply responded that the Union had the Company's "final position." When the Union again proposed modified union security (April 15), the Company falsely asserted that it would consider the proposals which were submitted at that meeting, and, by letter the next day, falsely asserted that the Union's proposal did not reflect any change in the Union's position. (My analysis of the February 20 meeting, *supra*, would apply to union security as well as wages.) Therefore the Company failed and refused to engage in meaningful negotiations concerning union security and checkoff, and there was no impasse on these matters as of April 15. See *N.L.R.B.* v. *Webb Furniture Corporation*, 366 F.2d 314, 316 (4th Cir. 1966). Similarly, the Company refused to acknowledge other significant changes in the Union's position as reflected by the Union's April 15 proposal; i.e., modification of the Union's proposals on sick leave and withdrawal of its demands for reinstatement of Cox and Taylor. The Union's April 15 proposals cut across the

spectrum of differences between the parties. The Company failed and refused to negotiate concerning those proposals. Therefore there was no impasse in contract negotiations as of April 15, or on April 22, when the Company implemented its wage proposals.

I further find, upon consideration of the evidence, that there was no impasse in negotiations on April 15 or 22, because the Company failed to bargain in good faith with the Union over the terms of a collective-bargaining agreement between the parties. Rather, the evidence indicates that the Company entered negotiations with a fixed intention of not reaching agreement on a contract. The Company's attitude is particularly illustrated by its positions and actions with regard to wages; i.e., the subject matter which is directly involved in this proceeding. I agree with the General Counsel's argument (br., p. 8) that the Company demonstrated "a propensity for undermining the Union's status through unilateral action." Before contract negotiations had even begun, the Company proposed to implement a general 8-percent wage increase. The Company notified the employees of its intention to grant the increase before the Union had an opportunity to respond to the proposal. Such action in itself circumvents and disparages the Union and demonstrates bad faith in bargaining. *Huck Manufacturing Company*, 254 NLRB 739, fn. 2 (1981). The Company proposed and implemented this wage increase notwithstanding its assertion (made as late as December 2) that it was not prepared to discuss wages. This excuse for preventing negotiations on a contract wage provision was demonstrably false. If the Company was able to formulate and implement a substantial wage increase, then it was able to discuss the matter of wages in the context of a proposed collective-bargaining contract. In April 1981 the Company again unilaterally implemented wage increases. In July 1981 the Company again proposed to unilaterally implement a general wage increase. This 8-percent wage increase exceeded the Company's last offer, and was the same increase which had been proposed by the Union to take effect on July 1, 1981. The Company offered no explanation as to why it could not have accepted the Union's proposal in April. Over the course of the negotiations the Company proposed, at various times: (1) a general 8-percent increase, retroactively effective to July 1, 1980, (2) COLA in accordance with the Union's initial proposal (subsequently withdrawn and replaced by proposed individual increases averaging 6-1/2 percent, and (3) a general wage increase of 8 percent), effective July 1, 1981. These proposals, viewed together, came close to meeting the Union's demands (of which Abbott was admittedly aware by February 20).[9] If the Company submitted these separate proposals in the form of a proposed contractual agreement, the parties might well have reached agreement at least on wages. Instead, the Company repeatedly submitted its wage proposals in the form of unilateral wage increases. In August 1980 and again in March 1981, the Company accompanied these proposals by letters to the employees in which it made clear that the Company, rather than the collective-bargaining process, should be regarded as the source of their benefits, and that everything would be fine if the Union would refrain from objecting to unilateral wage increases.

I further find that the Company manifested a lack of good faith in other areas of negotiation. On contract duration, the Company toughened its position while the Union was substantially reducing its demands in an effort to reach agreement. The Company initially proposed a 1-year contract. However on March 2, the Company, without explanation, proposed an expiration date of September 30, 1981, as part of its "final offer." At that point the duration of such contract would have been about 6-1/2 months. The duration would have been less, depending on the length of negotiations. The Company's proposal further demonstrated an intent to undermine the Union's representative status and a lack of good-faith bargaining. See *Huck Manufacturing Company, supra*, citing *Insulating Fabricators, Inc., Southern Division*, 144 NLRB 1325, 1329–30 (1963), enfd. 338 F.2d 1002 (4th Cir. 1964). The Company also demonstrated bad faith in the crucial areas of union security and checkoff. Union security and checkoff are (as here) matters of vital importance to a union, but which normally (assuming good faith) involve minimal interest, expense, or inconvenience to an employer. A union is obligated under law to represent all employees in the bargaining unit. Without union security, the union and its members are at the mercy of freeloaders who obtain the benefits of collective bargaining without any of the cost. Without checkoff, the union and its membership are even at the mercy of union members who may stop paying dues simply because they happen to be dissatisfied with the resolution of a grievance or some other union action. A union is also forced to resort to expensive and time consuming means of collecting dues, particularly where, as here, the employees work at widely varying hours. In the present case, the Company told the employees that it rejected union security and checkoff because "we feel that people do not have to join the Union to work at Saunders House" and "we do not feel that it is Saunders' House's responsibility to take dues out of any employee's pay and send it to the Union." However the Company does not have any general policy against making deductions from employee paychecks. Where, as here, an employer adamantly opposes union security and checkoff on such vague or generalized "philosophical" grounds, or questionable assertions of policy, the inference is warranted that the employer entered negotiations with a fixed intention not to consider or agree to any form of union security or checkoff. See *Hospitality Motor Inn, Inc.*, 249 NLRB 1036, 1040 (1980), enfd. 108 LRRM 2945 (6th Cir. 1982); *Sweeney & Company, Inc.* v. *N.L.R.B.*, 437 F.2d 1127, 1134–35 (5th Cir. 1971). Such inference is further warranted where, as here, the employer, at a crucial stage in negotiations, advances demonstrably false reasons for its position. As indicated, attorney Abbott told the board of inquiry that the Company opposed union security and checkoff because many employees had not wanted to join the Union at the time of the election, and because it did not know the desires of employees who replaced the

[9] It is possible that the Union was proposing an initial wage increase which would supplement rather than constitute the same increase as that implemented by the Company in September 1980. However the Company did not even bother to inquire as to the meaning of the proposal.

29 voters who no longer worked at the Company. However, when the Union proposed modified union security, which would exclude these categories of employees from the requirement of union membership (unless they had voluntarily joined the Union), the Company falsely asserted that the Union had not changed its position. Moreover, the explanation which Abbott gave to the board of inquiry was irrelevant to the matter of checkoff, because, in the absence of a union-security clause, checkoff would be voluntary on the part of the employee. I find that the Company entered into and participated in negotiations with a fixed intention not to consider or agree to any form of unionsecurity or checkoff. Therefore, for this additional reason, there was no impasse as to these matters. I further find that the Company demonstrated its lack of good faith by its refusal to acknowledge other changes in position contained in the Union's April 15 proposals, by its false representation that it would consider those proposals, and by its failure and refusal to bargain over wages as described above.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All full and regular part time service, maintenance and technical employees including dietary, housekeeping, maintenance and nursing including nursing aides, licensed practical nurses and licensed graduate practical nurses employed by the Company at its Lancaster Avenue and City Line Avenue, Philadelphia, Pennsylvania facility; excluding all other employees including professionals, managers, chefs, registered nurses, office clerical, guards and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.
4. At all times material the Union has been and is the certified exclusive collective-bargaining representative of the employees in tbe unit described below.
5. By refusing to bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit, by unilaterally granting wage increases in April 1981, at which time no impasse in bargaining existed, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.
6. By the aforesaid refusal to bargain, the Company has been and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has been, and is, violating Section 8(a)(5) and (1) of the Act, I shall recommend that it be required to cease and desist from such violations and to post appropriate notices. I further find that, as part of an appropriate remedy, the Company should be ordered to bargain, upon request, with the Union as the exclusive representative of the unit employees. See *Winn-Dixie Stores, Inc., supra*, 243 NLRB 972, 975; *Alsey Refractories Company*, 215 NLRB 785, 788 (1974). I agree with the General Counsel's argument (br., p. 15) that the Company's unlawful conduct constituted conduct which would tend to undermine the Union's representative status and to taint the subsequent negotiations. Therefore a resumption of bargaining is warranted as part of a complete remedy. By its unlawful conduct, the Company, to a significant extent, deprived the employees of the benefit of representation by a certified union, and deprived the Union of the benefit of such certification. The unfair labor practices which are alleged in the present complaint occurred slightly over 7 months after the Union's certification. Therefore, as requested by the General Counsel, I am recommending that, upon resumption of bargaining and for 5 months thereafter, the Union be regarded as if the initial year of certification had not yet expired. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (9th Cir. 1965).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, Saunders House a/k/a The Old Man's Home of Philadelphia, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Making unilateral wage increases, in derogation of its bargaining obligation, to its employees represented by District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO, in the appropriate bargaining unit described above; provided, however, that nothing herein shall require Respondent to vary such minimum salary schedules as are already established.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Regard the Union upon resumption of bargaining and for 5 months thereafter as if the initial year following certification had not expired.

(c) Post at its Pbiladelphia, Pennsylvania, facility copies of the attached notice marked "Appendix."[11] Copies of said notice on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of the receipt of this Order, what steps Respondent has taken to comply herewith.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT unilaterally implement wage increases for employees in the bargaining unit described below without first engaging in collective bargaining with District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO, although this does not mean we are now required to lower any minimum salary schedules presently established for these employees. The unit is:

> All full and regular part time service, maintenance and technical employees including dietary, housekeeping, maintenance and nursing including nursing aides, licensed practical nurses and licensed graduate practical nurses employed by us at our Lancaster Avenue and City Line Avenue, Philadelphia, Pennslyvania, facility; excluding all other employees including professionals, managers, chefs, registered nurses, office clerical, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL, upon request, bargain collectively with District 1199C, as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL regard District 1199C upon resumption of bargaining and for 5 months thereafter as if the initial year following certification had not expired.

SAUNDERS HOUSE A/K/A THE OLD MAN'S HOME OF PHILADELPHIA